

# **CHANGE IN THE ECONOMIC MODEL OF THE MANUFACTURERS**

## **THE DELETERIOUS CONSEQUENCES OF MARKET DEREGULATION**

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The European Automobile Agents Group (CEGAA) brings together various national groups of agents and repairers and represents over seven thousand companies.



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The business model of automobile manufacturers is very old.

It has consisted of producing vehicles and selling them to distributors, over whom there has been increasing control.

The manufacturers resisted as long as they could to the questioning of this model, taking advantage of the protection granted to them by the European legislator, through the system of exclusive distribution, then that of selective distribution.

This model, which has run out of steam, has been hit by the imperatives of the ecological transition, which has given rise to new, more agile and dynamic players, as well as by the digitalization of commerce, which has suddenly changed consumer expectations.

Manufacturers are thus inclined to reorganize their activity in an emergency, which explains a certain brutality.

The purpose of this note is to provide an overview of the current state of distribution and to highlight facts that are usually ignored, even though they are necessary to understand the challenges of this transformation.

## **I - DISTRIBUTION DOES NOT BENEFIT CONSUMERS**

In application of the Treaty, the European Commission authorizes the manufacturer to reserve the sale of new vehicles to its authorized distributors and thus to exclude from their distribution players who might be able to do so, provided that this organization benefits consumers.

Clearly, the model implemented does not provide the consumer with the benefit he is entitled to expect

### **1) The price of cars in Europe is very high**

Since the beginning of time, manufacturers have been building cars, which are marketed by distributors: dealers who form the primary network and agents, or second-tier distributors, who form the secondary network<sup>1</sup>.

These networks are generally organized on the basis of selective distribution: the sale of new vehicles is thus reserved for distributors who meet the

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<sup>1</sup> At least in some of the European countries.

selection criteria defined by the manufacturer.

These selection criteria, detailed in contracts and circulars, are usually several hundred pages long (signage, exterior appearance, interior appearance, tiling, lighting, furniture, equipment, personnel, organization, inventory, finance, etc.).

In the spirit of prohibiting access to the market for operators who are not established there, these selection criteria define an extremely costly distribution model, the cost of which is ultimately passed on to the sales price and therefore borne by consumers.



For the most part, these investments have no usefulness and are not necessary.

They tend to support a brand image, i.e. to convince the public of qualities that the product *itself* does not enjoy.

In addition, the European legislator authorizes the manufacturer to implement remuneration methods - a fixed margin insufficient for the profitability of the business, supplemented by a conditional margin - which ensure that he has close control over the pricing policy of his distributors, sometimes to an extent very close to the fixed price.

A comparison between the prices reserved for French and American consumers allows us to measure the inefficiency of this system:

Recommended prices "From", in euros <sup>2</sup>		
	France	USA <sup>3</sup>
Volkswagen Passat	35.320	22.537
Honda CR-V Hybrid	36.240	28.698
Toyota Rav4 Hybrid	33.900	27.135
BMW X5 xDrive45e	90.050	61.401
Volvo S60 Recharge Hybride	59.750	44.724
Hyundai Santa Fe Hybrid	36.900	31.590

In January 2022, the British website *confused.com* published the results of a comparative study of the average price of vehicles around the world.

Using the Toyota Rav4 as an example, the analysis shows that, with the exception of Poland, no European country is in the top ten countries with the lowest prices <sup>4</sup> :

### Cheapest countries to buy a SUV

		 Country	Local currency	£ USD	£ EUR
1		Canada	C\$28,850	\$22,806	€20,095
2		Japan	JP¥2,774,000	\$23,989	€21,132
3		Mexico	Mex\$494,300	\$24,214	€21,335
4		Ukraine	грн.693,486	\$25,222	€22,221
5		New Zealand	NZ\$38,290	\$25,937	€22,851
6		United States	\$26,525	\$26,525	€23,368
7		China	RMB¥175,800	\$27,565	€24,284
8		Australia	AU\$38,531	\$27,666	€24,374
9		Puerto Rico	\$29,070	\$29,070	€25,611
10		Poland	118,800 zł	\$29,647	€26,119

<sup>2</sup> prices on the manufacturers' websites in August 2021.

<sup>3</sup> As the prices are displayed exclusive of taxes due to the implementation of a tax system specific to each state, they have been uniformly increased by 10% for the demonstration (the taxes are generally lower).

<sup>4</sup> Cost of buying a car around the world, 26 January 2022 : <https://www.confused.com/car-insurance/car-buying-index> .

## 2) Car distribution does not know the Single Market

In the spirit of charging the highest possible prices on the markets where it is best established, the manufacturer is working to thwart the free circulation of its products on the internal market, which it is endeavouring to partition as much as possible, hindering parallel imports and occasionally exposing itself to legal proceedings and convictions<sup>5</sup>.

Price differences persist, which represent more than 40%, without the authorized distributors being able to pass on the benefits to their customers:

Recommended prices "starting at" PEUGEOT 2008 Active <sup>6</sup>							
Denmark	<b>28.910</b>	Belgium	21.829	Sweden	19.522	Italy	17.900
Netherlands	26.660	Finland	20.835	Poland	19.092	Hungary	17.084
Ireland	25.490	Greece	20.800	Croatia	18.809	Czech R.	17.074
France	22.700	Spain	20.700	Slovénia	18.690	Slovakia	16.990
Germany	22.100	Austria	19.910	Romania	18.207	Portugal	<b>16.690</b>

The activity of the intermediaries<sup>7</sup>, which the Commission recognizes as having the virtue of allowing consumers to benefit from the Single Market, is regularly opposed by manufacturers, who refuse to sell to them or impose purchase quotas, or who discriminate against their customers when it comes to providing vehicle warranties.

## 3) The system seems to escape the laws of the market

The covid-19 pandemic at the beginning of 2020 was followed by a disruption in the supply of semiconductors and an increase in the price of raw materials, all of which were aggravated by the consequences of the war in Ukraine.

Add to this the climate crisis and the end of the cheap energy it brings, as well as the decoupling of the world's economies, to consider that the difficulties promise to be long-lasting.

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<sup>5</sup>CJCE, September 17, 1985, aff. 25, 26/84, Ford v. Commission ; CJCE, September 18, 2003, Volkswagen v. Commission ; CJCE, April 6, 2006, aff. C-551/03, General Motors v. Commission ; TPICE, July 9, 2009, aff. T-450/05, Peugeot v. Commission.

<sup>6</sup> prices taken from the manufacturer's websites in August 2021.

<sup>7</sup> companies that, on the basis of a mandate issued by the consumer, will buy the vehicle on his behalf in a country of the Single Market where it is sold at a lower price.

These events have deeply impacted automobile production (2019/2021: -17.1%)<sup>8</sup>:

World production of passenger cars		
2019	2020	2021
74.327.411	61.615.202	61.632.571

They have obviously impacted the volume of registrations in Europe (2019/2021: -25.9%)<sup>9</sup>:

Passenger cars registrations in Europe		
2019	2020	2021
14.303.509	10.801.404	10.600.859

However, manufacturers have substantially increased their profits, as noted in a recent study by the auditing firm Ernst & Young<sup>10</sup>:

Résultats d'exploitation des constructeurs (EBIT) en millions d'euros		
2019	2020	2021
79.967	50.126	134.241

EBIT (en millions d'euros)	2012	2021	Évolution
Constructeurs allemands	28 593	48 703	+70 %
Constructeurs japonais	17 499	35 679	+104 %
Constructeurs américains	9 338	24 149	+159 %
Autres constructeurs européens	3 605	17 239	+378 %
Total (tous les constructeurs)	67 871	134 241	+98 %

<sup>8</sup> ACEA, World car production, <https://www.acea.auto/figure/world-passenger-car-production/>.

<sup>9</sup> ACEA, Passenger car registrations in Europe 1990-2021, by manufacturer, <https://www.acea.auto/figure/passenger-car-registrations-in-europe-since-1990-by-manufacturer/>.

<sup>10</sup> Ernst and Young, Analyse des principaux indicateurs financiers, Mars 2022, [https://assets.ey.com/content/dam/ey-sites/ey-com/fr\\_fr/topics/automotive-and-transportation/ey-les-plus-grands-constructeurs-automobiles-mondiaux-20220425.pdf?download](https://assets.ey.com/content/dam/ey-sites/ey-com/fr_fr/topics/automotive-and-transportation/ey-les-plus-grands-constructeurs-automobiles-mondiaux-20220425.pdf?download); Les Echos, May 4, 2022, 2021, Record year for the profitability of car manufacturers; Le Monde, July 29, 2022, Stellantis breaks its profitability records once again.

In the first quarter of 2022, the Stellantis Group managed to increase its revenues by 12.2%, while recording a 16.0% decrease in the number of vehicles sold<sup>11</sup>.

Overall, this improvement appears to be the result of a combination of cost containment, a solid price increase and, to make the most of this margin increase, the discontinuation of the most affordable vehicles.

In a market subject to normal competition, a manufacturer who increases its prices is likely to lose customers, as consumers will switch to the equivalent model offered by another manufacturer at a lower price.

It is clear that in the new car market, competition has been neutralized, with all manufacturers having decided to increase their prices by more than inflation or the increase in their costs, without any manufacturer taking advantage of more frugal pricing.

This is not a one-time situation.

It is not the product of a fortuitous conjunction of factors that would not be permanent.

It is more likely the expression of a real strategy.

On March 1, 2022, the management of the Stellantis group expressed its ambitions in no uncertain terms, anticipating the achievement of the following objectives by 2030<sup>12</sup>:

- on new vehicles, 400% increase in sales in the top of the range;
- based on a monetizable fleet of approximately 34 million connected vehicles in 2030, annual revenues of 20 billion euros for *Over-the-Air* services and 9 billion euros for data marketing, representing 100% growth;
- on online sales, 100% revenue growth each year until 2024, so that they represent one third of sales in 2030;
- 4 billion in annual revenue from services marketed through its marketplace;

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<sup>11</sup> [https://www.stellantis.com/content/dam/stellantis-corporate/investors/events-and-presentations/presentations/Stellantis\\_Q1\\_2022\\_Revenues\\_Presentation.pdf](https://www.stellantis.com/content/dam/stellantis-corporate/investors/events-and-presentations/presentations/Stellantis_Q1_2022_Revenues_Presentation.pdf).

<sup>12</sup> Stellantis, long-term strategic plan, Mars 1st 2022, *Dare Forward*, <https://www.stellantis.com/fr/finance/evenements/strategic-plan>.



- on mobility services sales, it is to go from an annual revenue of 40 million in 2021, to 2.8 billion in 2030 (seventy times the 2021 revenue);
  - on financial services, an increase of 100%, to reach an annual revenue of 5.8 billion euros;
  - in used vehicles, a 100% increase by 2030, to reach 2 million sales and more than 6 billion euros in revenue;
  - on spare parts, to become a multi-brand reseller, quadrupling revenues from independent aftermarket, for an overall increase in revenues of more than 50%;
  - in commercial vehicles, a 100% increase in revenues;
- for a "double-digit" overall operating margin, each year higher than 10%.**

How can this be possible in a competitive environment, and under pressure from a number of constraints, the most important of which is the amortization of supposedly considerable investments?

## **II - MANUFACTURERS ARE APPROPRIATING THE PROFITS OF PLAYERS IN THE SECTOR**

Although practices differ from one manufacturer to another, both in their nature and in their vigor, on the whole, the trend observed is as follows.

### **1) New vehicle distributors**

a) New vehicles are usually marketed by authorized, independent distributors, who buy the vehicles from the manufacturer and resell them to end users.

They are remunerated by the margin on the purchase/resale transaction, consisting of an invoice discount and conditional rebates, part of which is passed on to the end user in the form of a customer discount.

Some manufacturers (Stellantis, Volkswagen Group, Mercedes, Bmw and Volvo) have announced their intention to replace these distribution contracts with agent contracts.

The agent is not an independent actor: he is only the manufacturer's representative, and it is the latter who makes the sale.

In this new framework, the agent's intermediation will only justify a remuneration that could be reduced by half and a correlative increase in the manufacturer's margin.

In addition, since the selling price will henceforth be fixed by the manufacturer, the customer discount will disappear purely and simply, to be reintegrated into the manufacturer's margin.

b) The replacement of the distribution contract by the agent contract concerns no less than twenty-nine brands<sup>13</sup>, which represented 62% of registrations in the European Union in 2021<sup>14</sup>.

This is enough to show the importance of this change in Europe, which will replace tens of thousands of operators (the distributors of the networks concerned) with only five operators (the five manufacturers concerned), resulting in :

- an absolutely unprecedented concentration of the distribution market;
- as well as the instant ousting of the majority of the traditional players in the distribution market, without this change being the result of the choice of the operators concerned, nor being governed by the pursuit of their interests.

c) In addition, manufacturers seem determined to confiscate distributors' customers, regardless of the distribution model used: indirect distribution through authorized distributors or direct distribution through agents.

The reasoning is quite simple: as long as the customers have chosen its brand, the customer base would belong to the manufacturer.

This reasoning has no legal basis and no legal justification is offered.

An alternative is to argue, as a dodge, that customers belong to no one.

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<sup>13</sup> 29 brands - Stellantis : Peugeot, Citroen, Opel, Fiat, Vauxhall, Abarth, Chrysler, Dodge, Ram, Jeep, Lancia, DS, Alfa Romeo, Maserati ; Volkswagen Group : Volkswagen, Audi, Seat, Cupra, Skoda, Porsche, Bentley, Lamborghini ; Mercedes-Benz Group : Mercedes, Smart, Maybach ; Bmw Group : Bmw, Mini, Rolls-Royce ; Volvo Group : Volvo.

<sup>14</sup> source Acea : [https://www.acea.auto/files/20220118\\_PRPC\\_2112\\_FINAL.pdf](https://www.acea.auto/files/20220118_PRPC_2112_FINAL.pdf) .

If the customer does not belong to anyone, a customer file, on the other hand, is clearly an asset and is, moreover, subject to legal protection.

In reality, authorized distributors are contractually defined as independent traders.

As independent traders, they have developed their own customer base, at their own expense and risk, which is an essential part of their commercial property, regardless of the customers' attachment to a particular brand.

This is the state of French law, built around the concept of goodwill:

*"(... ) it should be remembered that the exclusive concession contract does not constitute a contract of common interest and that the concessionaire, as the owner of his business, develops his own clientele for his own account and in his own name, thus excluding any possibility of receiving a clientele indemnity; While a customer base exists at the national level due to the reputation of the licensor's brand, the local customer base only exists through the means used by the licensee, including the tangible elements of his business and the intangible element constituted by the lease; moreover, this customer base is itself part of the licensee's business since, even if the licensee is not the owner of the brand name and sign made available to him during the performance of the franchise agreement, it is created by his activity"<sup>15</sup>.*

In practice, however, distribution contracts require distributors to communicate their customers' data to the manufacturer, often refraining from providing for their return and, on the contrary, organizing their unavailability by storing them on the manufacturer's servers, then invoking the protection of databases or the confidentiality of protected information.

These same contracts generally allow the manufacturer to freely dispose of this data, outside the execution of the contract, to the extent that it can exploit it for its own direct benefit, for the benefit of other brands of its group and consequently, of competing distributors.

Better still, the manufacturer generally requires that it also be provided with the data of prospects, i.e. people who are not yet customers and to whom the distributor could in principle offer a competing product or service.

This arrangement, which is similar to an exclusive mandate (collecting information on behalf of the manufacturer), seems incompatible with the

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<sup>15</sup> Paris, March 1st, 2006, 03/16268, Opel v. Coroller Automobiles ; also: Paris, October 4, 2000, n° 1998/26846, Nicogi v. Gan ; Civ. 3<sup>ème</sup>, March 27, 2002, n° 00-20732.

status of independent trader, as well as with the status of multi-brand distributor.

It should be noted that an authorized distributor whose contract has been terminated and who subscribes to the terms of an agent's contract, loses - at least with regard to his activity of selling the brand's products and services - the status of independent trader and is no longer entitled to hold his own clientele.

As of this change, the agent will develop the manufacturer's clientele, which will be added to the one he will have been forced to transfer to him.

It should be noted that at this stage and by derogation to the fundamental rules of business life, this transfer of clientele is envisaged absolutely without any consideration (for free).

d) The European Commission has recently explained that:

*"For the agreement to be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty, the independent distributor must be genuinely free to enter into the agency agreement (for example, the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship)"<sup>16</sup>.*

In reality, this change is imposed.

Stellantis unilaterally terminated all of its distributors' contracts, in order to present (or not) an agent contract for their signature, without offering them any alternative.

Given the size of the investments made by these distributors in the service of the brand, which they have almost no chance of converting, they will have no choice but to subscribe to this new formula.

Volkswagen Group has decided to market its electric vehicles through a network of agents without terminating the contract.

As a result, the distributor contract, whose purpose is now limited to the resale of combustion engine vehicles, will quickly become meaningless, and the survival of the distributors will depend on their signing the agent contract.

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<sup>16</sup> project of guidelines on vertical restraints of May 10, 2022, C(2022) 3006 final, § 36.

## 2) Used car dealers

a) Dealers<sup>17</sup> have developed a used car trading business, which is linked to their new car sales business and whose profits compensate for the insufficient margin generated by the sale of new vehicles.

This activity, which requires significant capital and specific know-how, has always been carried out independently, outside the scope of the distribution contract.

Some manufacturers want to take this business away from the distributors, in order to appropriate it for themselves or at least to reserve the profits for themselves.

Within the framework of a network of authorized distributors, the distributor will be obliged to sell its used vehicles under the manufacturer's brand name, to use the partners (reconditioning, insurance and assistance, for example) designated by the manufacturer and to remunerate the manufacturer directly, through the payment of royalties.

This activity is sometimes *de facto* included in the annual agreement, among the activities that are subject to targets and rebates, like the activities that are specifically related to the execution of the distribution contract.

Some manufacturers have also decided to make used vehicles a contractual product, in the same way as new vehicles, formally integrating them into the scope of the distribution contract.

Within the framework of an agent network and insofar as it will sell the new vehicle that its agent delivers, the manufacturer will itself take back the customer's used vehicle.

He will recondition it in an industrial process and then resell it to the agent or to an end user directly.

In all cases, most of the margin from this activity is intended to go back to the manufacturer.

The distribution groups have invested heavily in the development of this activity (reconditioning centers, digitalization of the trade, deployment of their own brands and labels) and are now directly threatened.

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<sup>17</sup> as well as tier 2 distributors.

### **3) Repairers**

a) Maintenance and repair is carried out by authorized repairers, who are usually authorized distributors for new vehicles or agents (in the traditional sense of the term, i.e., Tier 2 distributor).

This is an activity that is largely carried out independently by repairers, who charge their customers for the work according to their own tariffs.

In a practice that is already widespread, the manufacturer sells a maintenance, repair or extended warranty contract directly to the customer, and subcontracts the work to the repairer.

The latter carries out the work, not on the basis of its own price list, but on the basis of the manufacturer's price list, which consequently takes its own margin on the service provided by the repairer.

The widespread use of maintenance contracts, extended warranties and long-term rental contracts between the manufacturer and the end user tends to extend this practice.

b) Authorised repairers are contractually obliged to provide the after-sales service that the manufacturer has sold to the customer.

To our knowledge, this activity, which is similar to subcontracting, is not otherwise regulated by the contract, even though it tends to represent a growing part of the activity of repairers.

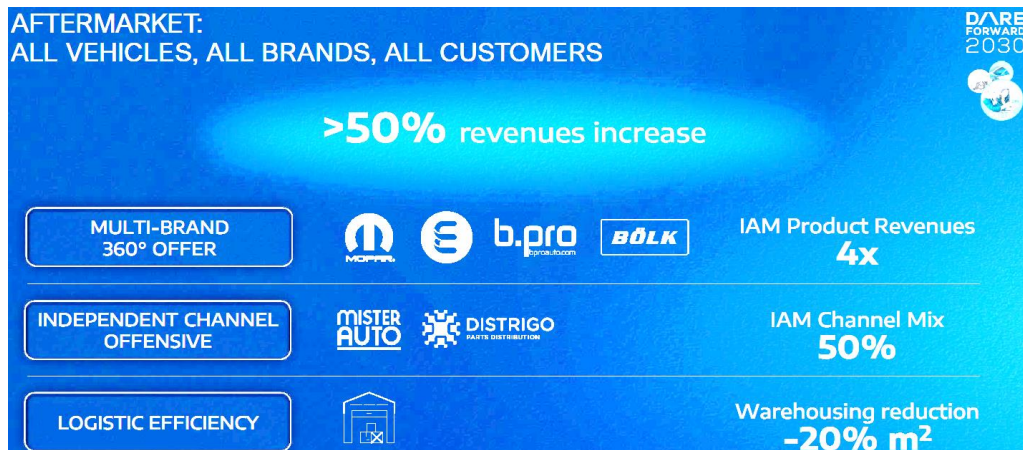
One can question about the legal qualification, regarding competition law, of an agreement concluded between two independent and competing after-sales service providers, the repairer and the manufacturer, under which the repairer is obliged to provide the service sold by his competitor, under conditions which oblige him to remunerate the competitor.

### **4) Spare parts distributors**

a) Manufacturers are moving away from their traditional activity of selling their own spare parts to their network, to engage in a purely commercial activity and become distributors of multi-brand spare parts<sup>18</sup>.

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<sup>18</sup> Stellantis long-term strategic plan, *Dare Forward*, p. 36.



b) Authorized repairers distribute spare parts: the manufacturer's spare parts (original parts bearing the manufacturer's brand) and spare parts marketed by the equipment manufacturers who produce them.

In some networks, the manufacturer has taken over the storage and distribution logistics of their parts, by appointing authorized distributors at wholesale level (sometimes subsidiaries of the manufacturer), who supply the authorized repairers.

Within this framework, the manufacturer undertakes :

- expand the range of parts it offers to its network, by adding to the original parts bearing their brand name, OEM parts, parts of equivalent quality and even reconditioned parts (its catalog can increase from a few thousand to a few tens of thousands of references) ;
- and to purely and simply forbid its distributors to buy directly from OEMs or independent wholesalers, as soon as the part is listed in the catalog.

As an obliged intermediary, the manufacturer thus benefits from privileged purchasing conditions from the equipment manufacturers (who are often its providers for parts built into new vehicles) and favorable sales conditions from its distributors and repairers, who are forced to buy parts at a high price.

At the same time, the manufacturer demands to know the identity of the repairers' buyers and the details of their purchases, to the extent that it can serve them directly.

c) The contract between the manufacturer and the authorised repairer, in so far as it allows non-authorised repairers to be excluded from the trade, is by its very nature liable to constitute an unlawful restriction of competition, which would render it void.

The European Commission exempts it and authorizes the formation of networks, subject to various conditions.

In particular, it specifies that agreements which "*restrict the ability of a producer of spare parts to sell such parts to authorised repairers*", cannot benefit from the exemption<sup>19</sup>:

Adding that:

*"One of the Commission's objectives as regards competition policy for the motor vehicle sector is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers"*<sup>20</sup>.

The model described above does not appear to be compatible with this approach.

d) Furthermore, the Commission considers that:

*"(...) an obligation on an authorised repairer to use original spare parts supplied by the motor vehicle manufacturer for repairs carried out under warranty, free servicing and motor vehicle recall work would not be considered to be a single-branding obligation, but rather an objectively justified requirement"*<sup>21</sup>.

Interpreting this system in the broadest possible way, some manufacturers require authorized repairers to use the manufacturer's original parts (rather than competing original parts) in the context of extended warranty contracts or maintenance contracts.

Insofar as such contracts are included in long-term rental formulas, the development of which is actively supported by the manufacturers, the equipment manufacturers are exposed to the risk of a significant reduction in their market.

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<sup>19</sup> regulation UE n° 461/2010 of May 27, 2010, JO L 129/52 of May 28, 2010, § 17 + article 5.

<sup>20</sup> supplementary guidelines on vertical restraints for the sale and repair of motor vehicles of May 28, 2010, 2010/C 138/05, § 18.

<sup>21</sup> supplementary guidelines on vertical restraints, § 18.



However, the Commission seemed to have envisaged this exception in a rather restrictive manner, specifying that :

*"[for] warranty conditions which require the use of the manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms [it seems] doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception (...)"<sup>22</sup>.*

## **5) Tier 2 distribution agents**

These second-tier distribution agents, which should not be confused with the agents that some manufacturers are planning to replace authorized distributors, generally hold an authorized repairer contract, to which a business contributor contract for new vehicles has been added.

They face the same difficulties as authorized repairers (who are also parts distributors) and used car dealers, since they carry out these different activities.

In general, they contribute to the sales activity of the authorized distributors by introducing them to customers and are remunerated by an indicator commission.

This activity, considered as a secondary activity, nevertheless requires them to invest in commercial structures and in particular in a showroom and signage to the manufacturer's standards.



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<sup>22</sup> supplementary guidelines on vertical restraints, § 69.

In practice, it generates derisory profits, if not zero, even though it contributes significantly to the manufacturer's sales (nearly one third at Stellantis).

This expense is easily imposed, because it is essential for the renewal of the local fleet, which the agent - an authorized repairer - maintains.

In view of the change of model operated by certain manufacturers, in particular when it consists in the passage from indirect distribution to direct distribution (Stellantis), the agent-distributors are not fixed on their future and the manufacturer may not find sufficient advantage in maintaining them.

The structures in which they are still actively required to invest would become useless.

And their future would be threatened in the medium term by the gradual reduction of their fleet, as consumers may turn away from a brand that gives up a local commercial presence.

## **6) Equipment manufacturers**

As soon as it supplies original parts to the manufacturer, the equipment supplier is bound by extremely rigorous contracts, which can present the following characteristics.

Firstly, the equipment supplier makes a long-term commitment to supply parts which will be used in the construction of vehicles and which will also supply the manufacturer's spare parts trading activity (the aftermarket).

During the negotiation of these contracts and during their execution, the equipment supplier is required to communicate to the manufacturer the details of its cost structure, compromising from the outset the balance of the relationship.

The communication of this information, which is already difficult to accept in a normal customer/supplier relationship, seems quite unacceptable in a relationship between competitors, since the OEM and the manufacturer are competing for the sale of the same parts on the aftermarket.

The advantage negotiated by the manufacturer is all the more important, as over time, the margin for price renegotiation is reduced, including in cases where, as today, production is affected by significant increases in the cost of energy and raw materials.

In the end, the manufacturer buys at conditions that are unattainable for independent distributors and thus gains a substantial advantage.

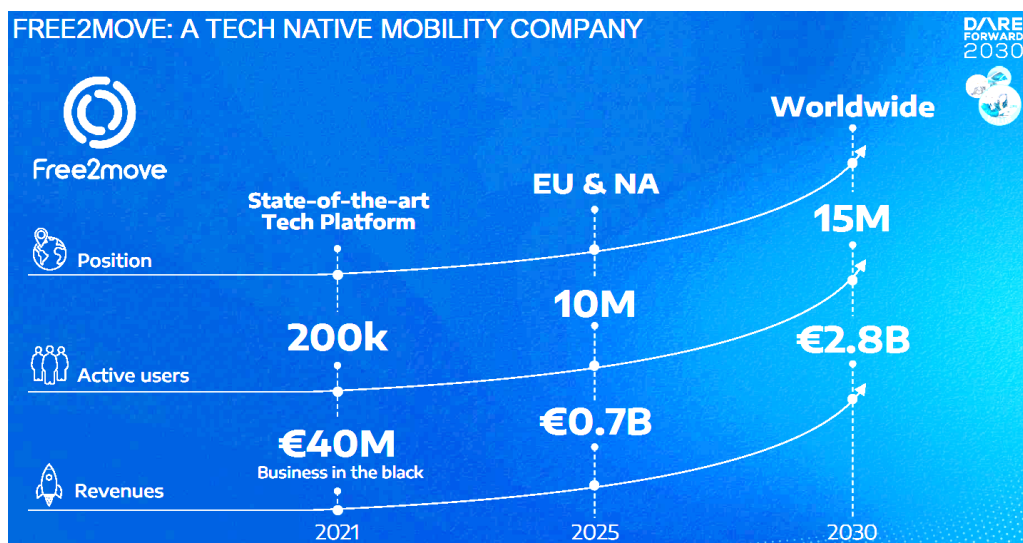
## 7) Leasers

a) The acquisition of a vehicle is generally envisaged by a cash payment or by the subscription of a credit, whether it takes the form of a consumer credit or a lease with purchase option.

An alternative formula tends to impose itself, which consists in the long term leasing of the vehicle.

Long-term leasing was usually offered to professional customers by leasing companies independent of the manufacturers (Arval, ALD, LeasePlan, for example), which marketed this formula to private customers.

Not involved in these activities, manufacturers have begun to invest in it in different ways, with the aim of establishing themselves as the main players in mobility<sup>23</sup>.



With this in mind, some manufacturers :

- strengthen the financial and operational capacities of their financial captive, if necessary through *joint ventures* with financial institutions ;

<sup>23</sup> Stellantis, long-term strategic plan, Mars 1st 2022, *Dare Forward*, p. 33.

- are developing a business of leasing to professionals and fleet management, in direct competition with the traditional players in the sector ;
- and prohibit rental companies from entering the private rental market under competitive conditions.

b) The new competition between manufacturers and leasing companies is impaired in various ways, which stem from the fact that manufacturers are both suppliers and competitors of leasing companies.

The leasing companies negotiate with the manufacturers on the terms of purchase of new vehicles, i.e. essentially, the granting of discounts linked to the volume of orders.

The following behaviour can sometimes be observed on this occasion.

The manufacturer expressly forbids the leasing company to rent its vehicles to private individuals, on pain of termination of the supply contract and return of the rebates.

Similarly, the manufacturer requires the leasing company to operate its vehicles in the country in which it purchased them, thus preventing it from taking advantage of price differences in the various EU Member States, which can represent 40% of the vehicle price.

The manufacturer takes advantage of its position as supplier :

- to favour the activity of its captive, by reserving for it volumes which it refuses to sell to rental companies and, if necessary, by calling into question firmly concluded supply agreements;
- to increase its profits, by unilaterally modifying the purchase conditions previously agreed with the rental company, without fearing any legal challenge.

The manufacturer requires the communication of sensitive information, to which it does not normally have access, such as :

- data relating to the identity of the rental company's customers, which the manufacturer recovers through its network (at the time of delivery, in particular), which is then accessible to its captive, i.e. the rental company's direct competitor;

- information on TCO (Total Cost of Ownership), which is the leasing company's most precious industrial secret, and which the manufacturer can pass on to its captive.

Finally, there is the question of the data produced by the vehicles, which the manufacturer intends to keep, even though it is essential for the development of mobility solutions by the rental companies.

These behaviors fall within the scope of competition law, in that

- they may constitute a horizontal restriction (between competitors), by dividing up the markets
- they may also constitute an abuse of a dominant position, if the manufacturer is seen as a controller of access to the downstream market (vehicle leasing), because it has the power to deliver or not the input that is indispensable for access to this market.

## **8) Financing organizations**

The distributors have always found in the marketing of financing offers an additional margin necessary for the profitability of their structures.

In the contract between the manufacturer and the distributor, although its wording is sometimes loose enough to give rise to interpretation, financial products are not contractual products.

Nevertheless, the manufacturers' captives develop financial products that compete with those of specialized banking institutions.

In practice, manufacturers often prohibit their distributors from offering competing financial products, for example by imposing mandatory price display standards or advertising standards.

## **9) Intermediaries**

Intermediaries are undertakings mandated by the end user to buy a new vehicle in another Member State, in order to take advantage of price differences within the European Union.

Their intervention is favourably considered by the Commission, precisely insofar as it makes it possible to overcome the partitioning of national markets and contributes to the implementation of the Single Market:

*"Those operators perform an important role in the motor vehicle sector, in particular by facilitating consumers' purchases of motor vehicles in other Member States"*<sup>24</sup>;

*"The internal market has enabled consumers to purchase motor vehicles in other Member States and take advantage of price differentials between them, and the Commission views the protection of parallel trade in this sector as an important competition objective. The consumer's ability to buy goods in other Member States is especially important as far as motor vehicles are concerned, given the high value of the goods and the direct benefits in the form of lower prices accruing to consumers buying motor vehicles elsewhere in the Union. The Commission is therefore concerned that distribution agreements should not restrict parallel trade, since this cannot be expected to satisfy the conditions (...) "*<sup>25</sup><sup>26</sup> of an exemption;

*"The Commission has brought several cases against motor vehicle manufacturers for impeding such trade, and its decisions have been largely confirmed by the European Courts"*<sup>27</sup>. This experience shows that restrictions on parallel trade may take a number of forms. A supplier may, for instance, put pressure on distributors, threaten them with contract termination, fail to pay bonuses, refuse to honour warranties on motor vehicles imported by a consumer or cross-supplied between distributors established in different Member States, or make a distributor wait significantly longer for delivery of an identical motor vehicle when the consumer in question is resident in another Member State"<sup>28</sup>.

Despite the repeated condemnation of manufacturers, not only are distributors still largely prevented from buying vehicles from anyone other than the manufacturer or its local representative, as they are entitled to do,

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<sup>24</sup> supplementary guidelines on vertical restraints, § 52.

<sup>25</sup> The notion that cross-border trade restrictions may harm consumers has been confirmed by the Court in Case C-551/03 P, *General Motors*, [2006] ECR I-3173, paragraphs 67 and 68; Case C-338/00 P, *Volkswagen/Commission*, [2003] ECR I-9189, paragraphs 44 and 49, and Case T-450/05, *Peugeot/Commission*, judgment of 9 July 2009, not yet reported, paragraphs 46-49.

<sup>26</sup> supplementary guidelines on vertical restraints, § 48.

<sup>27</sup> Commission Decision 98/273/EC of 28 January 1998 in Case IV/35.733 – *VW*, Commission Decision 2001/146/EC of 20 September 2000 in Case COMP/36.653 – *Opel*, OJ L 59, 28.2.2001, p. 1, Commission Decision 2002/758/EC of 10 October 2001 in Case COMP/36.264 – *Mercedes-Benz*, OJ L 257, 25.9.2002, p. 1, Commission Decision 2006/431/EC of 5 October 2005 in Cases F-2/36.623/36.820/37.275 – *SEP et autres/Peugeot SA*.

<sup>28</sup> supplementary guidelines on vertical restraints, § 49.

but the intermediaries themselves face significant obstacles in carrying out their activity.

It is indeed frequent that manufacturers put pressure on importers or local distributors to limit the sale of new vehicles to agents by applying quotas, or even prohibit it altogether.

Some manufacturers contractually require their distributors to respond to orders from agents only on condition that they issue the invoice in the name of the end user who gave the mandate, while this formula is incompatible with the economic and logistical model of these intermediaries and is also contrary to the guidelines defined by the Commission:

*"The only limitation on an intermediary's activities permitted in an agreement covered by Regulation 1400/2002 is therefore the need to show a valid mandate from an individual consumer. (...) No further requirements may be imposed if an intermediary is involved in the purchase of a new motor vehicle"<sup>29</sup>.*

### **III - MANUFACTURERS ARE TRYING TO FORECLOSE THE MARKET**

#### **1) Building an ecosystem**

Insofar as the manufacturer can profit, not only from the sale of the new vehicle, but also from its financing, leasing, equipment, maintenance and repair, the provision of services to its driver, its trade-in and resale as a second-hand vehicle, or the leasing of this second-hand vehicle, it is in the manufacturer's interest to keep it in its ecosystem.

This means ensuring that, from production to recycling, the vehicle remains a source of profit for the manufacturer, either directly or through the intermediary of the operators it controls.

In this perspective, market players who are likely to satisfy users' needs outside the ecosystem must be actively combated.

This is the case for rental companies, which market the use of vehicles outside the ecosystem and sometimes plan to have them serviced in their own network of authorized repairers.

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<sup>29</sup> Explanatory Brochure on regulation n° 1400/2002, § 5.2, p. 45.

This is the case for intermediaries, especially when they direct their customers to independent garages, which are able to maintain the vehicle, then buy it back when the time comes and resell it second-hand.

## **2) The ecosystem relies on the control of customer data**

The manufacturer must establish a direct relationship with the end-user and in particular, hold his personal data, whether it is his identity, his contact details, but also all the data that allows him to establish his profile, his habits and anticipate his needs.

Exactly like the way Gafam operates.

Some of this data is collected by the distributors, others are collected by the manufacturer itself on its Internet portal and others are produced and transmitted by the vehicle.

To be monetized, this data must be held exclusively.

This is the reason for the confiscation of the customer files of distributors and repairers, which the manufacturer intends to manage centrally, for the benefit of its entire commercial offer, all brands combined and, if necessary, on a global scale.

This is another reason why manufacturers are pushing for the concept of the Extended Vehicle, "*which encompasses the vehicle and its off-board servers*"<sup>30</sup>, whereby data is systematically hosted on the manufacturer's servers, which determine which data can be transmitted to third parties, as well as the modalities of this communication<sup>31</sup>.

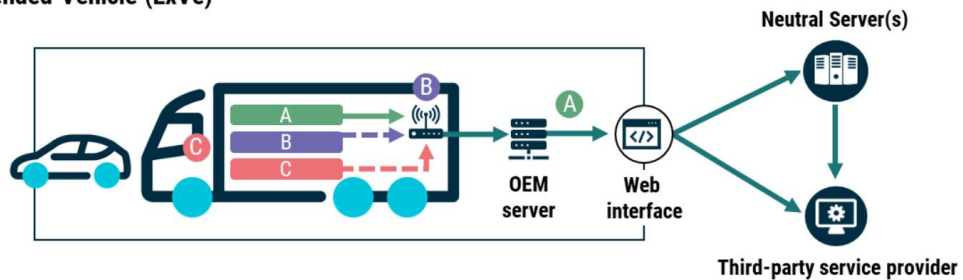
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<sup>30</sup> CCFA, Le Véhicule Étendu (ExVe) et la normalisation, [https://ccfa.fr/wp-content/uploads/2018/07/fiche-pays-ccfa\\_etendudef-1.pdf](https://ccfa.fr/wp-content/uploads/2018/07/fiche-pays-ccfa_etendudef-1.pdf)

<sup>31</sup> ACEA Position Paper, Access to in-vehicle data, Novembre 2021.



### Extended Vehicle (ExVe)



### Index

- A Data available on an ExVe interface
- B Data accessible via an ExVe interface but not yet transferred to this interface
- C Data generated by third-party apps

This scheme appears to exclude full, real-time access to data, leaving open the possibility for manufacturers to obtain remuneration for the data they would agree to deliver to their competitors.

### 3) The ecosystem relies on the control of market players

The ecosystem also assumes that all of the manufacturer's suppliers, service providers and customers, i.e., the market players with whom the manufacturer has a relationship, are bound by contractual ties that prohibit or limit their competitive activity.

This is why, although the contracts concluded with the distributors are liberally established in anticipation of a multi-brand activity, in practice, certain manufacturers mobilize all the resources of the distributors within the framework of an absolutely exclusive activity, sometimes even requiring that they expel from the perimeter of their company, activities which were originally there.

In practice and in contradiction with the letter of the contract, the distributor is generally subject to a strict exclusivity obligation.

It is important to understand that, in application of the measures described above, the clientele constituted by these distributors becomes unavailable for the representation of other brands.

All the more so in the context of agent networks, which are no longer intended to have their own customer base.

Market entrants, whether new manufacturers or rental companies offering innovative mobility solutions, will then face a major difficulty: they will no longer have access to distributors, even though the latter will be physically able to accommodate them..

In the context of the preparatory work for the adoption of the exemption regulation 461/2010, the company Kia Europe, which had recently entered the market, had expressed very clearly the nature of the difficulty:

*"(...) Kia strongly opposes the Commission's conclusion that same-showroom multi-branding has not facilitated entry of newcomers into the EU markets (...). In fact, even though the current rules have been in force for a limited period of time (only six years from the end of the transitional period), the experience Kia demonstrates that same-showroom multi-branding has facilitated market entry and growth, particularly in metropolitan and sparsely-populated areas. Indeed, in its Impact Assessment Report ("IAR"), DG Competition has expressly recognised that for smaller manufacturers such as Kia, "access to existing dealers is a factor facilitating entry"<sup>32</sup>.*

This type of ecosystem, if implemented by the major manufacturers, tends to foreclose the market: in fact, this is precisely its purpose.

#### **IV - MANUFACTURERS ESCAPE ALL CONTROL**

##### **1) Manufacturers benefit from a kind of judicial immunity**

a) The vulnerability of distributors stems from the size of their investments, which are generally amortized over long periods of time, and from the great difficulty of converting their structures (impossible in the case of a generalist brand, given the volumes necessary to balance the operation).

In this context, the Court of Cassation has nevertheless established the principle of the manufacturer's unconditional right to terminate the relationship, unless the distributor demonstrates that such a decision would be an abuse<sup>33</sup>.

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<sup>32</sup> letter from Kia Motors Europe dated September 24, 2009; this letter has been published on the Commission's website along with the contributions from other interested parties.

<sup>33</sup> Com., October 7, 1997, n° 95-14158, *Maine Auto c/ Volvo*.

At the same time, it established the manufacturer's right not to provide any reason for its decision<sup>34</sup>, which in practice compromises the control of abuse.

In practice, and for several years now, it can be considered that the Court of Cassation no longer controls the existence of a possible abuse.

It must be noted that lawsuits brought by distributors against manufacturers are almost always doomed to failure.

This is the conclusion that can be drawn from the decisions rendered by the Court of Appeal (specialized chamber) and by the Commercial Chamber of the Court of Cassation.

Cour d'appel Paris 5-4 From 01.01.2018 to 06.30.22		
Date	n°	Advantage
10.01.18	15/05719	Manufacturer
10.01.18	15/04591	Manufacturer
07.02.18	15/08853	Manufacturer
07.03.18	16/00742	Manufacturer
12.09.18	15/15234	Manufacturer
09.01.19	16/24317	Manufacturer
23.01.19	16/16856	Manufacturer
20.02.19	15/13603	Manufacturer
20.03.19	17/01088	Dealer
20.03.19	17/01247	Manufacturer
27.03.19	17/09056	Manufacturer
31.07.19	16/20683	Manufacturer
23.10.19	19/07878	Manufacturer
06.11.19	18/03352	Manufacturer
13.11.19	06/18147	Manufacturer
27.11.19	18/06901	Manufacturer
11.12.19	16/04717	Manufacturer
22.01.20	18/14922	Manufacturer
17.06.20	19/02268	Manufacturer
17.06.20	17/19307	Manufacturer
24.06.20	18/23867	Manufacturer
21.10.20	18/27620	Manufacturer
18.11.20	19/05086	Manufacturer
06.10.21	19/09879	Manufacturer
12.01.22	17/14189	Manufacturer
02.03.22	21/01545	Manufacturer
01.06.22	20/12790	Manufacturer

Cour de cassation Ch. commerciale From 01.01.2018 to 06.30.22		
Date	n°	Advantage
03.06.18	16-20910	Manufacturer
10.10.18	17-11542	Manufacturer
10.10.18	17-11543	Manufacturer
23.01.19	17-20055	Manufacturer
27.03.19	17-22083	Manufacturer
03.07.19	17-18681	Manufacturer
04.12.19	19-13394	Manufacturer
11.12.19	18-15098	Manufacturer
11.12.19	18-16190	Manufacturer
14.10.20	18-13399 et s.	Manuf./Dealer
03.03.21		
12.05.21	19-17580	Manufacturer
05.01.22	20-15436	Manufacturer
16.02.22	20-11754	Manufacturer
16.02.22	21-10451	Manufacturer
16.02.22	20-18615	Manufacturer

<sup>34</sup> Com., October 7, 1997, n° 95-14158, *Maine Auto c/ Volvo*, Com., June 6, 2001, n° 98-16378, *Garage Bellon c/ Volvo*.

b) The Court of Justice defined the conditions for the legality of the network in a 1977 ruling, specifying that the selection of distributors should be made on the basis of objective, pre-defined criteria:

*"(...) the Commission was justified in recognizing that selective distribution systems constituted, together with others, an aspect of competition which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion"*<sup>35</sup>.

This case law has been constantly renewed since then.

In France, the Court of Cassation considers that in the field of automobile distribution, the manufacturer is not obliged to select its distributors on the basis of predefined criteria, even when it has itself undertaken to make this selection on the basis of criteria that it has defined<sup>36</sup>.

Examples:

1°- the distribution contract provides that:

*"[the manufacturer] (...), distributes through its importer in France, the company [X] FRANCE, the products [X] through a selective, qualitative and quantitative distribution system (...);*

*The [X] Sales Standards as defined in this appendix constitute for a Distributor the access criteria which it must meet in order to become (...) a Member of the [X] Distribution and Service System";*

the Court of Cassation nevertheless ruled that:

*"(...) the requirement of good faith does not require, on the part of the head of a distribution network, the determination and implementation of such a selection process (...)"*<sup>37</sup>;

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<sup>35</sup> CJEC, October 25, 1977, Metro v. Commission, 26/76, Rec. p. 1875, § 20.

<sup>36</sup> Com., March 27, 2019, n° 17-22083, Fca c/ Catia Automobiles ; Com., May 12, 2021, n° 19-17580, Siac c/ Renault ; Com., February 16, 2022, n° 20-11754, Garage de Bretagne c/ Mercedes ; Com., February 16, 2022, n° 20-18615, Safirauto c/ Hyundai ; Com., February 16, 2022, n° 21-10451, Benmeleh c/ Hyundai.

<sup>37</sup> Com., March 27, 2019, n° 17-22083, Fca v. Catia Automobiles.

2°- the distribution contract provides that:

*"[the manufacturer] has decided to implement a quantitative and qualitative system of selective distribution and accordingly to entrust the distribution of new Brand [X] Vehicles to its Distributors selected according to criteria that [the manufacturer] has established and which are set forth in Appendix 1;*

*Authorized Distributor Standards (...): Minimum standards applicable in the geographic area in which the Authorized Distributor is established to be met to become an Authorized Distributor and sell Contract Products, as set forth in Schedule 1 (...)" ;*

the Court of Cassation confirms that :

*"(...) the obligation of contractual good faith does not require the head of a distribution network to determine or implement a process for selecting distributors on the basis of defined and objectively fixed criteria, nor to apply them in a non-discriminatory manner (...)" ;*

it adds that:

*"(...) a selective distribution system in which the network head refuses its approval without having assessed the application on the basis of the predefined qualitative criteria does not lose the benefit of the exemption conferred by the Vertical Agreements Regulation"<sup>38</sup>.*

To be related to the definition of selective distribution, according to the then applicable Regulation 330/2010:

*"'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria (...)"<sup>39</sup>.*

The Commercial Chamber of the Court of Cassation, to which the contradiction of its case law with the Community rule was pointed out,

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<sup>38</sup> Com., February 16, 2022, n° 21-10451, Benmeleh c/ Hyundai ; Com., February 16, 2022, n° 20-18615, Safirauto c/ Hyundai.

<sup>39</sup> regulation EU n° 330/2010 of April 10, 2010, relative to the exemption of vertical agreements, OJEU of April 23, 2010, L 102/1, article 1.1.e).

rejected the distributors' request for a preliminary ruling before the Court of Justice, which would have made it possible to know the position of the European judge.

c) In practice, the distributor considers that it no longer has any effective right: neither the right to usefully contest its exclusion, nor the right to enter the network if it meets the conditions for access.

In this spirit, the Court of Cassation still recognizes the manufacturer's right to refuse to examine the application of a distributor :

- that it has previously ousted, including in the context of an ordinary termination, without fault<sup>40</sup>;
- or who has sued him, the seizure of a court to decide a dispute being sufficient from his point of view to ruin the confidence necessary for the conclusion of a contract<sup>41</sup>.

Thus, the relationship between the parties is left entirely to the free will of the manufacturer.

Under these conditions and given the enormous burden of investment on distributors, the manufacturer has a decisive instrument of coercion, which explains the discipline and discretion of distributors, even though they generally experience the current changes as an aggression and a vital threat.

## **2) The European Commission is passive**

The Commission has not applied a sanction to a manufacturer since 2007.

Since 2010 and for the whole of the European Union, it has registered only twenty-two complaints, none of which has led to prosecution<sup>42</sup>.

In 2009, following the financial crisis that shook the automotive industry worldwide, the Commissioner for Competition made the following statement:

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<sup>40</sup> Com., September 28, 2010, n° 09-16424, Bmw c/ Sodac.

<sup>41</sup> Com., February 16, 2022, n° 20-11754, Garage de Bretagne c/ Mercedes.

<sup>42</sup> Commission Staff Working Document of the Motor Block Exemption Regulation du 28 Mai 2021, SWD (2021) 112 final, pp. 19, 28.

*"I have not gone into detail about the current crisis today, but **you can of course take for granted that we will not use competition policy to put unnecessary barriers in front of efforts to help the industry survive and adapt**"<sup>43</sup>.*

In 2010, the Commission abandoned the specific regulatory framework for car distribution, which had been painstakingly developed since 1985<sup>44</sup>, considering that these rules were too complicated, that they had contributed to the increase in distribution costs and that *flexibility* should be restored to manufacturers<sup>45</sup>:

*"(...) the current sector-specific rules create an unnecessary straitjacket that prevents car manufacturers from **organising their distribution systems as they see fit**"<sup>46</sup>.*

Let's be clear, *flexibility* is nothing more than the freedom for manufacturers to introduce rigidity.

In 2011, the Commission ended the monitoring of vehicle prices in the European Union, which it had undertaken since 1993 in order to identify differences between Member States<sup>47</sup>.

In 2010, when adopting Regulation n° 461/2010, specific to the automotive sector, the Commission had abandoned the idea of regulating distribution, considering that such a framework was not applicable, so the regulation was limited to regulating the after-sales:

*"As regards the distribution of new motor vehicles, **there do not appear to be any significant competition shortcomings** which would distinguish this sector from other economic sectors and which could require the application of rules different from and stricter than those set out in Regulation (EU) No 330/2010"*<sup>48</sup>.

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<sup>43</sup> Neelie KROES, Closing remarks at roundtable to discuss future of the Car Block Exemption, 9 Février 2009, SPEECH/09/45.

<sup>44</sup> regulation of specific exemptions for automobile distribution n° 123/85, 1475/95, 1400/2002.

<sup>45</sup> Commission Press Release, 27 May 2010, Commission adopts revised competition rules for motor vehicle distribution and repair, IP/10/619.

<sup>46</sup> Antitrust: Commission adopts revised competition rules for the motor vehicle sector: frequently asked questions, 27 Mai 2010, MEMO/10/217.

<sup>47</sup> [https://competition-policy.ec.europa.eu/sectors/motor-vehicles/documents\\_en#external-studies](https://competition-policy.ec.europa.eu/sectors/motor-vehicles/documents_en#external-studies) ; in its defense, the manufacturers had multiplied the versions and changed the names according to the markets, complicating the comparisons on purpose.

<sup>48</sup> regulation EU n° 461/2010 of May 27, 2010, relative to the exemption of vertical agreements in the car sector, OJEU of May 28, 2010, L 129/52, § 10.

On July 6, 2022, the Commission presented the project of a renewal for five years of this Regulation n° 461/2010, persisting in prohibiting the enactment of rules to frame the initiatives of manufacturers:

*"Overall, the evaluation concluded on 28 May 2021 showed that (...) while the motor vehicle market was likely to evolve in the coming years, **there had been no material developments** in the last decade that would justify a major revision of the [exemption regulation] regime"<sup>49</sup>.*

The tendency is therefore to exercise a *posteriori*, rather than a *priori*, control.

This seems rather surprising, if one considers that, in essence, the exemption regulation is conceived as *ex ante* legislation, elaborated with the aim of allowing interested parties to measure in advance what is legal and what is not:

*"Whereas it may be in the interest of undertakings to know whether any agreements, decisions or practices to which they are party, or propose to become party, may lead to action on the part of the Commission pursuant to Article 85 ( 1 ) or Article 86"<sup>50</sup>.*

By postponing until 2027 the enactment, or not, of new rules, the Commission is taking the risk of allowing manufacturers to implement a model that will be impossible or very costly to deconstruct in five years' time, and which will have irreversibly changed the structure of the market (*the winner takes all*).

It seems to us that certain behaviors would urgently justify not only an update of the conditions of exemption of the networks, but in certain cases, the opening of an investigation and the initiation of legal proceedings.

For example, how can we accept :

- the fact that the rules of selective distribution are not applied by the French courts;
- the *de facto* implementation of a strict exclusivity of representation, in contravention with the letter of the contract;
- the obligation for distributors to give up their used car trading activity to the manufacturer;

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<sup>49</sup> explanatory note accompanying the Commission's consultation of July 6, 2022, [https://competition-policy.ec.europa.eu/document/download/6b2253e4-81be-4aba-9713-ef5feaadbbee\\_en?filename=explanatory\\_note\\_MVBER\\_and\\_supplementary\\_guidelines\\_for\\_motor\\_vehicles\\_all\\_EU\\_languages.zip](https://competition-policy.ec.europa.eu/document/download/6b2253e4-81be-4aba-9713-ef5feaadbbee_en?filename=explanatory_note_MVBER_and_supplementary_guidelines_for_motor_vehicles_all_EU_languages.zip) .

<sup>50</sup> regulation EC n° 17 of February 21, 1962, OJEC L 204/62.



- the appropriation of the distributors' customer files, to an extent that would prohibit them from retaining the use of them: the manufacturers appropriate the customer files of their competitors, without the process - quite incredible - raising the slightest objection;
- the loss of the status of independent trader for several tens of thousands of distributors - more than half of the players in the retail distribution market - and their forced replacement by a handful of operators;
- the implementation of a direct distribution system, which would allow a few manufacturers, representing together more than half of the market, to impose retail prices;
- requiring OEMs to disclose their cost structures;
- prohibiting repairers from purchasing spare parts from independent OEMs or wholesalers;
- the refusal to grant leasing companies for the supply of vehicles to private individuals, the same pricing conditions as those granted to them for professionals;
- the prohibition for rental companies to operate their vehicles in a country other than the country of purchase;
- the obligation for rental companies to reveal their business secrets (*Total Costs of Ownership*) or to have their vehicles maintained in authorized networks;
- restrictions on the activity of agents, by making the supply of vehicles conditional on the satisfaction of excessive requirements.

None of these developments are included in the section on market developments in the Commission's voluminous working document accompanying its report on the effectiveness of the previous regulation<sup>51</sup>.

Finally, in the context of the exemption of vertical agreements, the Commission adopted a regulation in May 2022<sup>52</sup>, which strictly defines the conditions to be met by the agent contract that is envisaged to replace the authorized distributor contract.

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<sup>51</sup> Commission Staff Working Document of the Motor Block Exemption Regulation du 28 Mai 2021, SWD (2021) 112 final, p. 19.

<sup>52</sup> regulation EU 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJEU of May 11, 2022, L 134/4.

Apparently convinced that they are not exposed to the risk of complaints or legal action, some manufacturers assume to submit for signature by their distributors contracts that do not comply with these conditions.

## **V - RISKS**

### **1) The change of model entails the risk of economic damage**

#### **a) The disappearance of a part of the market players**

The change of model is not intended to create value, but to transfer value.

It is not a question of offering an innovative product or service, but of offering the same product or service in place of the traditional players in the markets concerned, by taking advantage of the contractual or commercial ascendancy that forces them to submit to these changes.

Insofar as the manufacturer appropriates a share of the turnover and/or margin of its partners, the latter are exposed to the loss of part of their income.

In this respect, it is important to realize that this confiscation is likely to affect all the automotive professions: distributors, agents, repairers, used car salesmen, equipment manufacturers, rental companies, etc...

In the case of distributors alone, the termination of contracts with distributors in the Stellantis network, prior to the signing of new contracts, will lead to a reduction in the number of network operators, whose volume of business will be increased by those leaving the network.

The manufacturer has not communicated on the number, nor the proportion, of the ousted distributors, which some commentators estimate at a quarter of the current network.

In any case, some companies will not be able to cope with the reduction in their income and will be forced to seek conversion - where possible - or to disappear.

Conversion is complicated by the fact that the manufacturer generally requires that all structures be maintained until the last day of the notice period, exposing the distributor to the consequences of an abrupt termination (French case law goes so far as to legitimize the requirement of

investments over the period, as long as it is required by the respect of selection criteria).

37% of distributors whose litigation has come before the Paris Court of Appeal since 2018 have been liquidated.

More often than not, the distributors and repairers who disappear are not replaced.

The case of used car trading is also edifying.

In the logic of the ecosystem, the manufacturer itself takes back the used vehicle from the buyer of a new vehicle.

Insofar as the manufacturer now favors long-term leasing, he retains, if not ownership, at least control of the vehicle.

This is exacerbated by the potential marginalization of independent leasing companies, which may lose access to the market as the manufacturer favors its own financial captive and will no longer be able to provide the used vehicles that dealers need.

In short, if manufacturers are able to keep vehicles in their ecosystem throughout their life cycle, distribution groups that have invested in a used brand, in vehicle reconditioning plants, in efficient merchant Internet sites, could be gradually driven out of the market if they cannot continue to access a sufficient resource.

In any case, whether it is new vehicles, used vehicles or services, the jobs and income they provide and which feed the local economic fabric will disappear, purely and simply, as inexorably as the distribution platforms have affected the retail trade and impacted local employment.

These activities are not of marginal importance and, on the contrary, contribute greatly to the economy of the regions, especially in the least dense areas, where the manufacturers themselves will never make any investment.

This economic impact will be added to the one caused by the dissolution of the productive fabric dedicated to combustion engines and their accessories.

## **b) The creation of new barriers to the entry of new players on the market**

This point has already been mentioned, without the need to return to it in detail.

As a result of the confiscation of customer files and the establishment of agent networks, more than half of the distributors will become unavailable to represent competitors of the manufacturers, whether they are new manufacturers, financing companies or, more generally, mobility players.

Moreover, the organization by manufacturers of a monopoly on the data generated by the vehicles they produce is likely to jeopardize the emergence of innovative mobility solutions, which it is generally agreed should gradually replace vehicle ownership.

The Commission's Internal Market Directorate General has taken the measure of this risk and, based on the observation that the value of data *"is concentrated in the hands of a relatively few large companies"*, has drawn up a draft regulation aimed at *"ensuring greater balance in the distribution of the value from data"* and *"ensuring fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data"*<sup>53</sup>.

It even envisages adding a specific regulation for vehicle data to this mechanism, which obviously seems desirable, even if it cannot make up for the lack of implementation of competition law and ordinary law.

## **2) The change of model entails the risk of social damage**

The social damage is not only the damage resulting from the destruction of jobs, which has been mentioned above.

They are also the ones to be expected from the loss of access to mobility.

The new model implemented by the manufacturer has no other aim than to increase its profits, by taking a margin on its partners' business, monetizing everything that can be monetized and controlling retail prices.

In this spirit, the manufacturer limits the availability of its vehicles to the most expensive models, which are also subject to substantial price increases.

The advent of the new business model is tending to increase prices, not only on new vehicles, but on all the activities that enable their use.

These ambitions know no other brake than the acceptability of these increases by the consumer.

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<sup>53</sup> proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) of February 23, 2022, COM(2022) 68 final, pp. 1, 2.

And this acceptability is itself largely under the control of the manufacturer, insofar as access to mobility is a compelling necessity, and as the manufacturer can take advantage of limited product availability to constantly raise the ceiling of acceptability.

This approach must still be considered with some hindsight.

In France, the average age of a new car buyer was 44 in 1991 and is now 58.

By the same token, sales to private individuals now account for only 46% of registrations.

New vehicles are unaffordable for most consumers.

Access to a vehicle is therefore achieved by having it paid for by the employer, in lieu of a salary increase, or by purchasing a used vehicle.

But the second-hand market is also being affected by inflation and is threatened with being taken over by the manufacturer in the near future.

It is in this context that the energy transition, the implementation of the Low Emission Zones (LEZ) and the need to replace the thermal vehicle by an electric vehicle, which is much more expensive, are being addressed.

To take this new step, the latest trick is to no longer communicate on the selling price, but exclusively on the amount of a rent, which has the advantage of distracting from the real cost and authorizing a new increase.

And in this approach, the manufacturer can still rely on the taxpayer, since the price he demands, which is definitely unaffordable, obliges the state to subsidize the purchase.

Since competition in the mobility market is likely to remain constrained by the control over data, it is obviously to be feared that the emergence of competing and disruptive mobility solutions cannot be counted on (especially if they threaten the manufacturer's profitable model).

At this stage, two observations are in order.

**First, the deregulated market has not and cannot satisfy consumer needs.**

**Secondly, the all-out inflation promised by the implementation of the new business model of the manufacturers, which will be added to the additional cost of electrification, will simply deprive of access to mobility**

**people who could previously rely on the use of one or even several vehicles.**

## **CONCLUSION**

The conclusion that seems to be necessary is that, contrary to the usual presentation, the legal framework for distribution is non-existent or, at best, ineffective.

It is necessary to define, with the necessary precision, rules that will allow the market to regain the flexibility it lacks, by allowing operators to develop models and services that they can initiate.

First, it is imperative to restore the autonomy of the market players, the manufacturer's partners, by ensuring the rebalancing of conventions and the prohibition of constraints that tend de facto to control their competitive behavior.

Exclusivity, which tends to be widespread without even being formally agreed, must be combated, including in the deployment of agent contracts.

Secondly, the integrity of the commercial property of manufacturers' partners must be ensured by effectively protecting the information that is at the heart of their business.

This obviously includes, but is not limited to, customer data, which must remain under the control of those who produce it, since it determines their existence and development in a now digital economy.

Since the Commission has the ambition and the duty to ensure the normal play of competition, it is up to it to renovate its legal environment and to establish these new standards, within the framework of the exemption regulation for automobile distribution agreements.

It remains to be added that such measures do not call into question the model to which manufacturers aspire, but only tend to ensure that this model is not the only one to which consumers will have access.

September 19, 2022.